1869. Argued with No 108 & 181

Mar. 13. Reversed & Remanded

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 281.

SAMUEL C. MORGAN, APPPELLANT,

vs.

THE TOWN OF BELOIT AND THE CITY OF BELOIT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WISCONSIN.

FILED AUGUST 6, 1868.

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1 Circuit Court of the United States of America for the district of Wisconsin.

UNITED STATES OF AMERICA, *District of Wisconsin, ss*:

At a stated term of the Circuit Court of the United States of America for the district of Wisconsin, begun and held, according to law, at the city of Milwaukee, in said district of Wisconsin, on the second Monday (being the thirteenth day) of April, A. D. 1868, present, the Honorable Andrew G. Miller, district judge, presiding, Cassius Fairchild, marshal, Edward Kurtz, clerk.

Among other the following proceedings were had, to wit:

SAMUEL C. MORGAN, complainant,
vs.
THE TOWN OF BELOIT and THE City of Beloit, defendants. } In equity.

Be it remembered, that heretofore, to wit, on the seventh day of October, A. D. 1867, came the above-named complainant by his solicitor, Mr. Carpenter, and filed his bill of complaint against the above-named defendants, as follows;

2 To the judges of the Circuit Court of the United States for the district of Wisconsin, in equity:

Samuel C. Morgan, of Norwich, Connecticut, and a citizen of the State of Connecticut, brings this his bill of complaint against the town of Beloit, a municipal corporation existing in the State of Wisconsin, under and by virtue of the laws of the State of Wisconsin, and the city of Belolt, a municipal corporation existing in the State of Wisconsin, under and by virtue of the laws of the State of Wisconsin.

And thereupon your orator complains and says:

That the legislature of the State of Wisconsin, in A. D. 1853, passed an act entitled "An act to authorize the town of Beloit to aid in the construction of a certain railroad from the city of Racine to the village of Beloit," approved February 10, A. D. 1853, being chapter 12 of the private and local laws of the State of Wisconsin, passed and enacted in A. D. 1853, by which said act it was provided as follows:

"SECTION 1. The board of supervisors of the town of Beloit are hereby authorized to subscribe for the town of Beloit one hundred thousand dollars to the capital stock of a railroad company authorized to construct a railroad from the city of Racine to the village of Beloit, and to pay for the same in the bonds of said town, payable in twenty years, with interest payable annually, in the city of New York, not exceeding seven per cent.

"SEC 2. The shares of stock in said railroad company, thus taken by said town, and all dividends arising from the same, are hereby

irrevocably pledged for the payment of the interest and principal of said bonds: Provided, however, That the board of supervisors of said town may sell such shares, but the proceeds thereof, and interest, shall still be pledged to pay the interest and principal of said bond.

"SEC. 3. The board of supervisors of the town of Beloit, whenever the same shall become necessary, shall annually levy a tax upon the taxable property of said town, sufficient to pay the interest upon such bonds, after deducting the dividends due to such town on said shares of stock.

"SEC. 4. The board of supervisors of said town shall annually appoint one railroad commissioner, who shall attend the annual or special meetings of the stockholders of said railroad company, for the election of directors thereof, and shall be entitled to cast one vote for every share of stock which said town shall hold in said railroad company; and in case of his absence or inability to attend, to appoint in writing, under their hands, some other person, who shall have the same power.

"SEC. 5. No bonds shall be issued in pursuance of the
3 provisions of this act until a majority of the legal voters of said town voting upon said question shall vote in favor of the same, at an election called by said board of supervisors for that purpose to be held in the village of Beloit. At such election those voting in favor shall vote a ballot with the words inscribed thereon: 'For the railroad,' and those voting against shall vote a ballot with the words inscribed thereon: 'Against the railroad.'

"One week's previous notice of said election shall be given in a public newspaper printed in the village of Beloit, and this act shall be published in connection therewith. Said election shall be conducted, and the returns thereof made and canvassed in the same manner as the annual town meetings of the said town.

"SEC. 6. This act shall take effect immediately."

That said town of Beloit, under and in pursuance of said act, afterwards, to wit, on the 21st day of May, A. D. 1853, at Beloit, in said district, subscribed for one thousand shares of the capital stock of the Racine, Janesville and Missisippi Railroad Company, a railroad company authorized as in said act mentioned, amounting to one hundred thousand dollars, and paid for the same then and there in the bonds of said town, fifty of said bonds being numbered from one to fifty inclusive, for the sum of one thousand dollars each, and one hundred of said bonds being numbered from fifty-one to one hundred and fifty inclusive, for the sum of five hundred dollars each, amounting in all to the sum of one hundred thousand dollars; the said town of Beloit being then and there duly authorized to pay for the said stock in and with said bonds, a majority of the legal voters of the said town of Beloit, voting upon said question, having voted in favor of the same at an election before then called and held according to the provisions of said act; and that said bonds, when so issued and delivered in payment to said company, had thereto attached interest warrants in the usual form, commonly called coupons, and that said

company then and there received said bonds, with said interest warrants attached, in payment for said stock, and thereafter sold and disposed of the same to divers bona fide purchasers, and the same have since passed from hand to hand like other negotiable paper, in the stock markets of the United States, and the said bonds were the only bonds ever issued by the said town of Beloit for railroad stock; that afterwards, and after all of said bonds had been disposed of by said railroad company, and were held by, and were circulating among bona fide owners and holders, the Legislature of the State of Wisconsin duly passed an act, entitled "An act to incorporate the city of Beloit," approved March 31st, A. D. 1856, which act your orator prays leave to refer to, and by which act the district of country, in the then county of Rock, and in the then town town of Beloit, contained within the limits and boundaries mentioned in the said last-named act, was declared to be a city by the name of Beloit; and the people then inhabiting, and those who should thereafter inhabit the district of country described in said last-named act, were de-
4 clared to be a municipal corporation by the name of "the city of Beloit;" that all of the said territory, mentioned in said last-named act, constituted a part of the territory of said town of Beloit, from the first day of January, A. D. 1853, until the passage and approval of said last-named act, and was subject to taxation to pay the principal and interest of said bonds according to said act hereinbefore first set forth; and the said act, creating said city of Beloit, provided further, as follows:

"SEC. 16. Section twelve of this chapter shall be so construed as not to apply to the construction of a new bridge across Rock river, in said city, on or near the site of the old one, but the expense of building such bridge shall be paid by the city and town of Beloit, jointly, each paying the same proportions upon their assessment rolls, the same as though said town and city were not divided, and all bonds now issued, or which may hereafter be issued by the present board of supervisors of said town, before the first election under this charter, shall be paid when due, both the principal and interest, by the said town and city, in proportion to the valuation of their respective taxable property, as per their respective assessment rolls, the same as though the said town and city were not divided, and all other sum or sums of money or bonds required to complete the construction of said bridge, may be issued and paid, either by the supervisors of the town of Beloit, previous to the first election under this act, or by the town or city of Beloit after such election, and in either case, such funds or money shall be paid when due, by the said town and city, equally, in proportion to the respective amount of taxable property, as by their respective rolls, and in case either pay more than their just and equal proportion, the other party shall be liable for the same in an action on the case brought by the party so paying for the same.

"SEC. 17. All principal and interest upon all bonds which have heretofore been issued by the town of Beloit, for railroad stock or other purposes, shall be paid when the same, or any portion of the

same, shall fall due, by the city and town of Beloit, in the same proportions as if said town and city were not dissolved, such proportions to be apportioned in the same manner as provided in section sixteen of this chapter; and in case either town or city shall pay more than their just and equal portion of the same, at any time, the other party shall be liable therefor in the same manner as provided in said section sixteen of this chapter."

That said last-named act also further provided that said act should cease to be a law, or to have effect, on the first Monday of June then next, in case a majority of the electors residing within the limits of said proposed city, should, at the then next town meeting, to be held in the town of Beloit on the first Tuesday of April then next, vote "no city charter," as provided for in said act. And your orator shows that at said election, which was held in said town on said first Tuesday of April, next of the passage and approval of said last-named act, a majority of the qualified electors of said town of Beloit, residing within the limits of said proposed city, voting on said question, cast ballots on which were written or printed "city charter," as provided for in said last-named act; and that said last-named act remained in full force until the legislature of the State of Wisconsin subsequently duly passed an act, entitled "An act to amend an act entitled 'An act to incorporate the city of Beloit, approved March 31, 1856;'" approved March 3, A. D. 1867, which last-named act your orator prays leave to refer to; and which last-named act, provided among other things, that all property, real and personal, within said city, except such as might be exempt by the laws of the State of Wisconsin, should be subject to taxation for the support of said city government and the payment of its debts and liabilities; and said last-named act also further provided as follows, viz:

"Sec. 15. This act shall be so construed as not to apply to the construction of the new bridge across Rock river, in said city, on or near the site of the old one, but the expenses of building said bridge shall be paid by the city and town of Beloit, jointly, each paying in the same proportions upon their assessment rolls the same as though said town and city were not divided, and all bonds now issued, or which may hereafter be issued, by the present board of supervisors, for the payment of such bridge, shall be paid when due, both principal and interest, by the said town and city, in proportion to the valuation of their respective taxable property, or for [as per] their respective assessment rolls, the same as though said town and city were not divided.

"Sec. 16. All principal and interest upon all bonds which have heretofore been issued by the town of Beloit, for railroad stock or other purposes, shall be paid when the same, or any portion of the same shall fall due, by the city and town of Beloit, in the same proportions as if said town and city were not dissolved, such proportions to be ascertained in the same manner as provided in the last section; and in case either town or city shall pay more than their just and equal portion of the same, at any time, the other party shall be liable therefor, in the same manner as provided in said section."

That heretofore, to wit, on the 27th day of December, A. D. 1864, your orator, being the bona fide holder and owner of certain past due coupons which had been attached to certain of said bonds, commenced his action at law in this honorable court, as plaintiff, against said the town of Beloit, as defendant, to recover the amount thereof, and your orator's damages suffered on account of the non-payment thereof; and such proceedings were thereupon had, that afterwards, to wit, on the 25th day of September, A. D. 1867, by the consideration and judgment of said court in said cause, your orator recovered against the town of Beloit aforesaid, the sum $57,675 90-100 dollars debt and damages, and the sum of $60 50-100 dollars costs of his said suit.

That therefore, to wit, on the 15th day of February, A. D.
6 1865, your orator, being the bona fide owner and holder of certain other of the past due coupons which had been attached to certain of said bonds, commenced his action at law in this honorable court, as plaintiff, against said the town of Beloit, as defendant, to recover the amount thereof, and your orator's damages suffered on account of the non-payment thereof; and such proceedings were thereupon had, that afterwards, to wit, on the 25th day of September, A. D. 1867, by the consideration and judgment of said court in said cause your orators recovered against the town of Beloit aforesaid the sum $7,606 28-100 dollars debt and damages, and the sum of 49 40-100 dollars costs of his said suit.

That heretofore, to wit, on the 14th day of February, A. D. 1866, your orator, being the bona fide owner and holder of certain other of the past due coupons which had been attached to certain of said bonds, commenced his action at law in this honorable court, as plaintiff against said the town of Beloit as defendant, to recover the amount thereof and your orator's damages suffered on account of the non-payment thereof; and such proceedings were thereupon had, that afterwards, to wit, on the 25th day of September, A. D. 1867, by the consideration and judgment of said court in said cause, your orator recovered against the town of Beloit aforesaid, the sum $5,223 50-100 dollars debt and damages, and the sum of 47 98-100 dollars costs of his said suit.

That heretofore, to wit, on the 16th day of February, A. D. 1867, your orator, being the bona fide owner and holder of certain other of the past due coupons which had been attached to certain of said bonds, commenced his action at law in this honorable court, as plaintiff against said the town of Beloit as defendant, to recover the amount thereof and your orator's damages suffered on account of the non-payment thereof; and such proceedings were thereupon had, that afterwards, to wit, on the 25th day of September, A. D. 1867, by the consideration and judgment of said court in said cause, your orator recovered against the town of Beloit aforesaid the sum $5,403 75-100 dollars debt and damages, and the sum of 49 dollars costs of his said suit.

That heretofore, to wit, on the 22d day of December, A. D. 1862, your orator, being the bona fide owner and holder of certain other of

the past due coupons which had been attached to certain of said bonds, commenced his action at law in this honorable court, as plaintiff against said the town of Beloit as defendant, to recover the amount thereof and your orator's damages suffered on account of the non payment thereof; and such proceedings were thereupon had, that afterwards, to wit, on the 25th day of September, A. D. 1867, by the consideration and judgment of said court in said cause, your orator recovered against the town of Beloit aforesaid the sum $2,490 76-100 dollars debt and damages, and the sum of $49 5-100 dollars costs of his said suit, as appears by the records of said several judgments now remaining in this honorable court, and to which your orator prays leave to refer.

7

That each, every and all of said judgments was and were rendered on and for the amount of certain of said coupons which were attached to said bonds when said bonds were delivered in payment as aforesaid by said town of Beloit to said railroad company, and matured subsequently, and damages for the non-payment thereof; that every of said judgments remains in full force and effect, not reversed, vacated, annulled, or set aside; that neither of said judgments has been removed to the Supreme Court of the United States on writ of error or otherwise; that the whole amount of each and all of said judgments is due and unpaid, and justly and equitably owing from said defendants to your orator; and that the said amount of said judgments ought to be paid by said defendants to your orator in the proportions respectively, as provided in the said acts in that behalf hereinbefore set forth; that the taxable property of the said city of Beloit greatly exceeds the town of Beloit; that although the said city of Beloit ought to pay to your orator the proportion of said judgments respectively, as provided in said acts hereinbefore set forth in that behalf, yet your orator is remediless as against the city of Beloit, by the strict course of the common law, and has no remedy except in a court of equity.

Your orator further shows that the judgments hereinbefore first set forth were rendered on coupons then past due, which had been attached to said bonds, as aforesaid, and that the amounts of said coupons and the date of the maturity thereof are as follows, that is to say:

February 10, A. D. 1855, 2,520 dollars.
February 10, A. D. 1856, 1,890 dollars.
February 10, A. D. 1857, 4,340 dollars.
February 10, A. D. 1858, 2,450 dollars.
February 10, A. D. 1859, 4,480 dollars.
February 10, A. D. 1860, 4,480 dollars.
February 10, A. D. 1861, 5,250 dollars.
February 10, A. D. 1862, 5,040 dollars.
February 10, A. D. 1863, 5,250 dollars.
February 10, A. D. 1864, 5,250 dollars.
February 10, A. D. 1865, 5,180 dollars.
February 10, A. D. 1866, 4,690 dollars.
February 10, A. D. 1867, 4,690 dollars.

Your orator further shows that the last assessment roll of the said town of Beloit, before the said city of Beloit was incorporated, mentioned in section 12, chapter 10, so-called, of said chapter 452, Private and Local Laws of 1856, aforesaid, amounted to 368,045 dollars; and that the amount of taxable property as taken from said assessment roll belonging to said city, was about 71 64-100 per cent. of the whole amount thereof, and that the amount of taxable property as taken from said assessment roll belonging to said town was about 28 36-100 per cent. of the whole amount thereof, and that the
8 amounts of the assessment rolls of said town and city respectively, as equalized in each year thereafter were and are as follows, viz:

Years.	Town of Beloit.	City of Beloit.
1856	$265,365 00	$ 541,146 00
1857	270,146 00	730,000 00
1858	330,790 00	1,929,196 53
1859	375,265 00	1,455,472 00
1860	400,681 00	1,588,124 13
1861	367,304 25	1,373,465 71
1862	370,114 25	1,325,716 00
1863	345,040 00	1,118,453 00
1864	357,115 00	1,242,778 00
1865	299,909 90	1,135,866 00
1866	294,972 90	1,127,128 00
1867	328,653 00	1,319,103 00

And your orator further shows, that by the proportions for payment by said town and said city, respectively, fixed by said acts, hereinbefore set forth, dividing the amount which matured in A. D. 1855, and in A. D. 1856, above mentioned, upon the basis of the assessment roll of said town, equalized in the year 1855, and said other sums, according to the several amounts of said respective assessment rolls, in force, respectively, at the times of the maturity thereof, the amounts of said coupons, and interest from the maturity thereof, to the 25th day of September, 1867, the day of the rendition of said judgments, which ought to be paid by the said town and city, respectively, are shown by the following table, that is to say:

Years.	Amount of coupons and interest.		City of Beloit.	Town of Beloit.
1855..	Coupons	$2,520 00		
	Interest	2,227 05		
		$4,747 05	$3,400 79	$1,346 26
1856..	Coupons	$1,890 00		
	Interest	1,537 98		
		$3,427 98	$2,455 80	$ 972 18
1857..	Coupons	$4,340 00		
	Interest	3,227 86		
		$7,567 86	$5,077 82	$2,490 04
1858	Coupons	$2,450 00		
	Interest	1,651 28		
		$4,101 28	$2,993 50	$1,107 78
1859..	Coupons	$4,480 00		
	Interest	2,704 79		
		$7,184 79	$6,133 17	$1,051 62
1860..	Coupons	$4,480 00		
	Interest	2,391 19		
		$6,871 19	$5,462 73	$1,408 46
1861..	Coupons	$5,250 00		
	Interest	2,474 68		
		$7,724 68	$6,168 40	$1,556 28
1862..	Coupons	$5,040 00		
	Interest	1,984 50		
		$7,024 50	$5,513 83	$1,510 67
1863..	Coupons	$5,250 00		
	Interest	1,699 68		
		$6,949 68	$5,432 91	$1,516 77
1864..	Coupons	$5,250 00		
	Interest	1,332 18		
		$6,582 18	$5,030 33	$1,551 85
1865..	Coupons	$5,180 00		
	Interest	951 81		
		$6,131 81	$4,762 34	$1,368 47
1866..	Coupons	$4,690 00		
	Interest	533 49		
		$5,223 49	$4,132 39	$1,091 10
1867..	Coupons	$4,690 00		
	Interest	205 19		
		$4,895 19	$3.879 82	$1,015 37
	Total	$78,430 68	$60,443 83	$17,986 85

10 That said city and said town ought respectively to pay to your orator interest on their respective total amounts, as last above stated, from the 25th day of September, A. D. 1867, the day

of the rendition of said judgments, to the day of the payment of said amounts respectively; and that said town and said city ought each to pay your orator one-half of the costs recovered in said judgments, as hereinbefore stated.

To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may upon oath, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make, to all and singular the matters and things hereinbefore set forth; and that your orator may have such other and further relief as the nature of his case may require, and as shall be agreeable to equity and good conscience.

May it please your honors to grant unto your orator the most gracious writ of subpœna to issued out of and under the seal of this court, to be directed to the "The Town of Beloit" and "The City of Beloit," defendants, strictly commanding them, by a day certain, and under a certain penalty, therein to be named, to be and appear before your honors in said court, to answer the premises, and to stand to and abide by such order or decree as your honors may render in the premises; and your orator will ever pray, &c.

MATT. H. CARPENTER,
Solicitor for Complainant.

MATT. H. CARPENTER,
Of Counsel.

Whereupon a subpœna issued, as follows:

11 UNITED STATES OF AMERICA, *District of Wisconsin, ss*:

The President of the United States of America to the town of Beloit and the city of Beloit, greeting:

You are hereby commanded that you personally appear before the judges of the Circuit Court of the United States of America for the district of Wisconsin, in our court of chancery in and for the district aforesaid, on the first Monday of November, next ensuing, at Milwaukee to answer to a bill of complaint, exhibited against you in our said court, by Samuel C. Morgan.

And to do further, and receive what our said court shall have considered in that behalf; and this you are not to omit under the penalty which may ensue.

This process of subpœna is directed to the marshal of this district who is hereby commanded to serve the same upon the said the town of Beloit and the city of Beloit, if to be found in his district, and due return thereof make.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in the said district, this seventh day of October, in the year of our Lord one thousand eight hundred and sixty-eight, and of our independence the ninety-second.

EDWARD KURTZ, *Clerk.*
MATT. H. CARPENTER, *Solicitor.*

It is ordered by our said court, that the said the town of Beloit and the city of Beloit the defendants aforesaid, do enter their appearance in this suit, in the clerk's office, on or before the day and time at which this subpœna is returnable, as aforesaid; otherwise the bill filed may be taken as confessed.

12 *Return to subpœna.*

Subpœna returned: "Served in the within-named town of Beloit, by delivering a copy of this subpœna personally to Charles Peck, chairman, and to E. F. Gates, clerk of the board of supervisors of said town of Beloit, this 10th day of October, 1867, and served on the within named city of Beloit, by delivering a copy of this subpœna personally to Ira I. Shue, mayor, and to C. F. G. Collins, clerk of said city of Beloit, this 10th day of October, 1867."

CASSIUS FAIRCHILD, *Marshal.*
By H. P. STRING, *Deputy.*

Fees, $15 30.

Rule to plead.

NOVEMBER 4, 1867.

"On motion of Matt. H. Carpenter, complainant's solicitor, ordered that the said defendants and each of them plead, answer or demur to the bill of complaint in this cause on or before the 1st Monday of December, A. D. 1867, or said bill will be taken as confessed against them."

Appearance.

DECEMBER 2, 1867.

This day came the defendants by their attorneys, Messrs. Palmer, Hooker, and Pitkin, and filed their appearance and demurrer, as follows:

U. S. Circuit Court, district of Wisconsin.

SAMUEL C. MORGAN
vs.
THE TOWN OF BELOIT and THE CITY of Beloit.

MILWAUKEE, *Dec.* 2, 1867.

13 SIR: Please enter our appearance as solicitors for the defendants in the above-entitled cause.

Yours, &c.,

PALMER, HOOKER & PITKIN.

To Edward Kurtz, Esq., clerk, &c.

Circuit Court of the United States for the district of Wisconsin.

Demurrer.

SAMUEL C. MORGAN
vs.
THE TOWN OF BELOIT and THE CITY of Beloit.

And said demurrer is as follows:

The demurrer of the town of Beloit and the city of Beloit, defendants, to the complaint of Samuel C. Morgan, complainant.

These defendants, respectively, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true, in such manner and form as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer show that the said complainant hath not in and by his said bill made or stated such a case as does or ought to entitle him to such discovery or relief as therein sought and prayed for from or against the said defendants.

Wherefore these defendants demand the judgment of this
14 honorable court, whether they shall be compelled to make any further or other answer to the said bill or any of the matters or things therein contained and pray to be hence dismissed with their reasonable costs in this behalf sustained.

PALMER, HOOKER & PITKIN,
Sol'rs for Def'ts.
H. L. PALMER, *of Counsel.*

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

H. L. PALMER,
Of Counsel for Def'ts.

Demurrer set for argument.

DECEMBER 14, 1867.

"On motion of Matt. H. Carpenter, solicitor for complainant, ordered, that this cause be set down for argument on the demurrer of the defendant for the first day of the next January term of this court, to wit, the first Monday of January, A. D. 1868."

Demurrer argued and submitted.

JANUARY 7, 1868.

This day came the parties by their counsel, and the demurrer to this bill came on to be heard and was argued by Mr. Carpenter for the complainant and by Mr. Palmer for the defendants, when the court held the same under advisement.

And now, at this same term, to wit, April term, A. D. 1868, and on the seventh day thereof, to wit, on the twentieth day of
15 April, A. D. 1868, the following proceedings were had, to wit:

Decree.

SAMUEL C. MORGAN
vs.
THE TOWN OF BELOIT and THE CITY of Beloit. } In equity.

This day came the parties by their counsel, and the demurrer to this bill having been argued, it is thereupon ordered, adjudged and decreed by the court that the complainants' bill of complaint be and hereby is dismissed, and that the complainant pay the costs to be taxed within ten days or in default thereof an execution be issued against him for the same.

A. G MILLER.

Appeal.

APRIL 21, 1868.

This day came into court the complainant by his counsel and prayed an appeal to the Supreme Court of the United States; whereupon it is ordered by the court that an appeal be and hereby is allowed. A bond of Mat. H. Carpenter and Josiah A. Noonan in the penalty of five hundred dollars for costs of said appeal being presented, the same is approved ; said bond is as follows:

United States Circuit Court, district of Wisconsin, appeal bond.

SAMUEL C. MORGAN
vs.
THE TOWN OF BELOIT and THE CITY of Beloit.

16 *Bond on appeal.*

Know all men by these presents that we, Matt. H. Carpenter, as principal, and Josiah A. Noonan, as surety, are held and firmly bound unto the town of Beloit, and the city of Beloit, in the sum of five hundred dollars, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators firmly by these presents. Signed with our hands, and sealed with our seals this 21st day of April, A. D. 1868, provided however, this obligation is upon the following conditions, viz: Whereas in the above-entitled cause, on the 20th day of April, A. D. 1868, a decree was made by said court dismissing the bill of complaint of the said Samuel C. Morgan against said the town of Beloit and the city of Beloit, and

whereas the said Morgan has this day prayed an appeal from said decree, to the Supreme Court of the United States. Now, therefore, if the said Morgan shall make his appeal good, or answer and pay all costs or damages that may be awarded against him by said Supreme Court, then this bond shall be void, otherwise of force.

[SEAL.] MAT. H. CARPENTER.
[SEAL.] J. A. NOONAN.

DISTRICT OF WISCONSIN, STATE OF WISCONSIN, *Milwaukee County, ss:*

Matt. H. Carpenter and Josiah A. Noonan, being first duly
17 sworn, each for himself says, that he is worth more than five hundred dollars over and above all liabilities and exemptions of property from forced sale on execution; that he is a resident and freeholder of the State of Wisconsin.

MATT. H. CARPENTER.
J. A. NOONAN.

Subscribed and sworn to before me this 21st day of April, A. D. 1868.

[SEAL.] GEO. COGSWELL,
Notary Public in and for the State of Wisconsin, residing in Milwaukee county.

Endorsed as follows: April 21, 1868. Bond approved by the court. A. G. Miller.

Whereupon a citation issued:

18 UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

I, Edward Kurtz, clerk of the Circuit Court of the United States of America for the district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom now on file and remaining of record in my office, being a full and complete exemplification of the record and proceedings in the suit of Samuel C. Morgan *vs.* The town of Beloit and the city of Beloit.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court at the city of Milwaukee, in said district of Wisconsin, this second day of June, in the year of our Lord one thousand eight hundred and sixty-eight, and of the independence of the said United States, the ninety-second.

[SEAL.] EDWARD KURTZ, *Clerk.*

19 The United States of America to the town of Beloit and the city of Beloit, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the first Monday of December next, pursuant to an appeal in the

Circuit Court of the United States of America for the district of Wisconsin, wherein Samuel C. Morgan is appellant and you are appellees, to show cause, if any there be, why the decree passed against the said Samuel C. Morgan, should not be reversed, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this twenty-first day of April, in the year of our Lord one thousand eight hundred and sixty-eight, and of our independence the 92d.

[SEAL.] A. G. MILLER, *District Judge.*

We admit service of above citation.
June 11th, 1868.

PALMER, HOOKER & PITKIN,
Att'ys for Town Beloit, and for City of Beloit.

Supreme Court of the United States.

December Term, 1868. No. 281

SAMUEL C. MORGAN, APPELLANT,

vs.

THE TOWN OF BELOIT

AND

THE CITY OF BELOIT.

BRIEF FOR APPELLANT.

MATT. H. CARPENTER, *Counsel.*

Coyle & Towers, Stationers.

Supreme Court of the United States.

DECEMBER TERM, 1868.

SAMUEL C. MORGAN, APPELLANT,
vs.
THE TOWN OF BELOIT
AND
THE CITY OF BELOIT.
No. 281.

In 1853, the Legislature of Wisconsin authorized the town of Beloit to aid in the construction of a certain railroad by subscribing to the capital stock of the company the sum of $100,000, and paying therefor the bonds of the town, subject to the result of an election to be held under the act. The election was held, the vote was favorable to the project, and the town subscribed for the stock and issued its bonds in payment, a portion of which came to the complainant as *bona fide* purchaser.

In 1856, the Legislature created the city of Beloit over a portion of the territory which had constituted the town of Beloit; and in the charter of the city provided, (Printed Laws 1856, 991:)

"*All principal and interest* upon all bonds which have heretofore been issued by the town of Beloit *for railroad stock*, or other purposes, *shall be paid when the same or any portion thereof shall fall due*, by the city and town of Beloit, in the same proportions as if said town and city were not dissolved."

This provision was again enacted in 1857.
Pr. Laws 1857, 437.

Afterwards, the complainant commenced actions at law in the circuit court of the United States for the district of Wisconsin, and recovered judgments against the town of Beloit, on certain coupons which had been attached to said bonds; which judgments are fully described in the bill of complaint.

These judgments remaining in full force and unsatisfied against the town, the complainant exhibited his bill to have the amounts thereof ascertained which the town and city ought to pay respectively, and for a decree against the city for its proportion of the indebtedness.

I.

The complainant, the holder of these bonds, was clearly entitled to some remedy against the city for its proportion of the sum secured thereby, and the question is, *what was the appropriate remedy?*

The complainant, in fact, commenced actions at law against the town. The town pleaded in abatement the non-joinder of the city as a co-defendant. But the circuit court overruled this plea because the town and city were not joint obligors, and expressly reserving the expression of an opinion as to whether the complainant might not have maintained a bill in equity against both town and city, held that the action at law on the bonds was properly brought against the town alone, and that the town was primarily liable to the bondholder at law for the full amount of the bond, principal, and interest; and that the town might, after paying the whole amount, have its remedy against the city for the proportion which the city ought to pay.

In Goodhue *vs.* Beloit, 21 Wis., 636, the supreme court of Wisconsin held, under a similar provision of the same charter, that a joint action at law could not be maintained against the town and city. The court, however, very strongly intimate that a suit in equity against both town and city might be maintained.

The court say:

"Whether, *on principles of equity*, the plaintiffs, on a complaint properly framed, might not have had the court determine the amount each ought in equity, as between themselves, to pay, and have a judgment rendered against each for its proportion, is unnecessary for us now to determine, as that question is not properly before us."

It is believed that no action at law can be maintained against the city *on these bonds*. To such an action, the plea of *non est factum* by the city would be true in fact and fatal in law. If any action at law could be maintained against the city, it would be debt *founded on the statute*. But then there would be the difficulty of settling, as between the city and the town, the proportion which each ought to pay, in an action where the town was not a party. This consideration alone, it is submitted, gives a court of equity jurisdiction. There must be a decree as between the town and city, fixing their respective proportion of the indebtedness before a decree can be rendered against the city. Hence a court of equity is the only tribunal that can render complete justice between all the parties.

Again, if the town were compelled to pay the whole debt, it would be entitled to an action against the city for the proportion which the city ought to pay. Circuity of actions is therefore avoided by maintaining a suit in equity against both. The charter binds the city to pay, not a certain sum of money, nor an ascertained or specified proportion of the bonds, but a proportion to be ascertained by extrinsic facts and evidence; and the town is interested in the question of the amount to be recovered against the city. The town should, therefore, be a party to the proceeding, which it can be only in a court of equity.

By the law of Virginia and Kentucky an endorsee cannot maintain an action at law against a remote endorser; but this court has held that, for that reason, he might have suit

in equity. The principle decided is, "Equity will make that party *immediately* liable who is ultimately liable at law."

Riddle *vs.* Mandeville, 5 Cranch, 322.

Bank U. S. *vs.* Weisiger, 2 Pet., 331.

This principle justifies the bill in this case.

II.

That this claim has been reduced to judgment against the town is no objection to proper proceedings against the city. It is only in the case of joint contractors that a judgment against one merges the contract as to the other.

III.

The bill contains a prayer for general relief, and that is sufficient. Under such prayer the court will grant the ordinary equitable relief to which the complainant is entitled upon the facts stated in the bill. This was held by this court in December term, 1850, subsequent to the *rule* upon which the defendants' counsel rely.

Tayloe *vs.* Insurance Company, 9 How., 390.

MATT. H. CARPENTER,
Counsel for Complainant and Appellant.